IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- 884

THE RIPON SOCIETY, INC., *et al.*,
Petitioners

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents

BRIEF AMICUS CURIAE OF CERTAIN REPUBLICAN PARTY OFFICEHOLDERS IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI, TOGETHER WITH MOTION FOR LEAVE TO FILE SAID BRIEF

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v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents

MOTION OF CERTAIN REPUBLICAN PARTY OFFICE-HOLDERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI

United States Senators Edward W. Brooke of Massachusetts, Charles H. Percy of Illinois, Lowell P. Weicker, Jr. of Connecticut, Congressmen/women John B. Anderson of Illinois, Edward G. Biester, Jr. of Pennsylvania, Silvio O. Conte of Massachusetts, Millicent Fenwick of New Jersey, Paul Findley of Illinois, Bill Frenzel of Minnesota, Gilbert Gude of Maryland, Margaret M. Heckler of Massachusetts, H. John Heinz III of Pennsylvania, Stewart B. McKinney of Connecticut, Peter A. Peyser of New York, Thomas F. Railsback of Illinois, Massachusetts State Republican Chairman John W. Sears, and Vincent F. Albano, Jr., Chairman of the New York

County Republican Committee, for himself and the Committee (herein referred to as the "Amicus Republicans"), by their attorney, respectfully move the Court for leave to file the attached brief *amicus curiae* in support of the Ripon Society's petition for a writ of *certiorari*, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

Each of the Amicus Republicans has served in governmental and/or Republican Party positions for many years. All have been active in every phase of state and national party politics. Most have attended at least one Republican National Convention, and together they have participated in every Republican National Convention since 1960. Their deep interest in and long service to the GOP is beyond question and provides the basis on which the views they express in the annexed brief deserve the attention of this Court.*

The constitutionality of the formula by which delegates to the National Convention are apportioned between the states—and the outcome of this suit—are of immediate, practical concern to each of the Amicus Republicans, because continued use of the present inequita-

* Other groups with similar interests and expertise have been permitted to participate in earlier stages of this litigation. The Republican State Committees of Delaware and Wyoming were granted leave to appear as *amici curiae* in the original district court proceedings in this case. 343 F. Supp. 168, 169 (1972). The Republican State Central Committees of Arizona, Georgia, Hawaii, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oregon, South Carolina, Utah, and Washington were allowed to intervene to apply for a stay of the district court's injunction prior to the 1972 Convention. 409 U.S. 1222 (1972). The *en banc* District of Columbia Court of Appeals invited the Democratic National Committee to argue and submit a brief *amicus curiae* in 1975. And of course both petitioners and respondents supported their district court motions for summary judgment with affidavits of persons and organizations engaged in Republican Party and national convention activities.

ble formula may determine the selection of the Party's presidential and vice-presidential candidates, as well as significantly affect the rules that will govern future conventions and the platform on which they and other Republicans must run. These experienced politicians and officeholders would expect to contribute to the Court's understanding of (1) the impact of the "victory bonus" on the functioning of the National Convention, (2) the degree to which the present apportionment has permitted self-perpetuating, small-state, regional factions of the Party to dominate national conventions to the disadvantage of Republicans from larger states and other areas of the country, (3) the inadequacies of the political arguments advanced by the Court of Appeals and the respondent Republican National Committee in defense of the rationality of the present allocation plan, and (4) the recent history of the intra-Party dispute over Convention apportionment, the prospect for further litigation and attendant confusion in light of the *en banc* Court's unwillingness to resolve the threshold questions of state action and justiciability, and the need for a definitive judicial ruling on these issues.

On all of these matters—the constitutional relevance of which is readily apparent—the Amicus Republicans have special expertise and a unique perspective that will enable them to provide the Court with valuable counsel. The parties herein have been long involved in the legal issues presented by this case and are hardly newcomers to the realm of practical politics. Neither the Republican National Committee nor the Ripon Society, however, is composed of officeholders whose efforts to win reelection in November 1976 will be directly affected by the composition, deliberations, and performance of next year's Republican National Convention. It is in recognition of this fact that the Amicus Republicans seek leave to present the brief attached hereto.

For the foregoing reasons, the Amicus Republicans respectfully request that this motion be granted so that they may be allowed to file their brief in support of the petition of the Ripon Society for a writ of *certiorari* in this cause to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

THE RIPON SOCIETY, INC., *et al.*,
Petitioners

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents

BRIEF AMICUS CURIAE OF CERTAIN REPUBLICAN PARTY OFFICEHOLDERS IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI

This brief *amicus curiae* is filed on behalf of United States Senators Edward W. Brooke of Massachusetts, Charles H. Percy of Illinois, Lowell P. Weicker, Jr. of Connecticut, Congressmen/women John B. Anderson of Illinois, Edward G. Biester, Jr. of Pennsylvania, Silvio O. Conte of Massachusetts, Millicent Fenwick of New Jersey, Paul Findley of Illinois, Bill Frenzel of Minnesota, Gilbert Gude of Maryland, Margaret M. Heckler of Massachusetts, H. John Heinz III of Pennsylvania, Stewart B. McKinney of Connecticut, Peter A. Peyser of New York, Thomas F. Railsback of Illinois, Massachusetts State Republican Chairman John W. Sears, and Vincent F. Albano, Jr., Chairman of the New York County Republican Committee, for himself and the Committee (herein referred to as the "Amicus Republicans"). These elected Republican Party officeholders call upon the

Court to issue a writ of *certiorari* in this cause to the Court of Appeals for the District of Columbia Circuit, as urged by the Ripon Society, *et al.*, plaintiffs and cross-appellants below.

INTEREST OF AMICI CURIAE

The interest of the Amicus Republicans, all of whom are elected Republican Party officeholders intimately concerned with the operation of the GOP's quadrennial national nominating conventions, is set forth at pages two and three of the motion for leave to file to which this brief is annexed.

ARGUMENT

The decision of the Court of Appeals on rehearing *en banc* is fatally unsound in a number of respects, as is amply demonstrated in the Ripon Society's petition for *certiorari*. In order to fully appreciate the detrimental consequences of a failure to reverse the *en banc* Court's ruling, though, it is desirable to highlight several points: (1) the "victory bonus" will have a significant (if arbitrary) impact on the functioning of the 1976 National Convention; (2) the present apportionment plan has permitted self-perpetuating, small-state, regional factions of the Party to dominate national conventions to the disadvantage of Republicans from larger states and other areas of the country; (3) the political arguments advanced by the Court of Appeals and the respondent Republican National Committee in defense of the rationality of the present allocation plan are seriously deficient; and (4) the recent history of the intra-Party dispute over Convention apportionment, and the prospect for further litigation and attendant confusion in light of the *en banc* Court's unwillingness to resolve the threshold questions of state action and justiciability, heighten the already pressing need for a definitive judicial ruling on these issues.

Impact of the Victory Bonus

While the Court of Appeals did not question the substantial effect of the Rule 30 victory bonus on the composition of the National Convention, the enormity of bonus' electoral impact must be stressed. At Kansas City in 1976 more than one out of every four delegates will have been awarded on the basis of the bonus formula. Over 600 of the roughly 2200 delegates—or nearly 30 percent of all the delegates—are apportioned to the states by this method. Needless to say, the votes of these delegates may well determine who will be the Republican nominee in 1976. Richard Nixon, for example, won nomination in 1968 by only 51.9 percent of the vote, receiving 692 ballots, just 25 more than the 667 needed for a majority. A different apportionment fairly reflecting the interests of Republicans in every state would clearly have altered the deliberations of that gathering and could have resulted in the nomination of a different Republican candidate in 1968.[1] Because of the large number and potentially great influence of these bonus delegates in determining who will receive one of the two major presidential nominations, the rule by which such delegates are allocated to the states must be subjected to close constitutional scrutiny.

Convention Domination by the Beneficiaries of the Malapportionment

As this Court has noted frequently in the context of the legislative districting cases, one of the most pernicious effects of malapportionment is to permit the entrenchment in the malapportioned body of those persons and interests who benefit from the misallocation. The territorial dis-

[1] To take one representative example, if the 1968 Convention had been apportioned in accordance with Electoral College strength, and each state's delegates had voted in proportion to the actual 1968 convention vote of that state, Nixon would have received only 650 votes on the first ballot, 17 less than the number necessary for nomination.

crimination of the GOP's victory bonus has in fact provided a ready mechanism for the self-perpetuation of those groups that now prevail within the Republican Party—prevail at the cost of denying to all other Party members the fair and equal starting place in the political process that is guaranteed to them by the Constitution. To quote from the vacated opinion filed by a division of the Court of Appeals on March 5, 1975:

> "The right to an equal vote serves to prevent an entrenchment of any one group of interests to the exclusion of others even if freely chosen in the most democratic fashion, [footnote omitted] because such an entrenchment in the very process of political choice is contrary to the democratic ideal. In each election, warring interest groups must theoretically re-contest the balance struck at the last election. In this manner, democratic change is permitted if such change is desired." Pages 43-44 of the Appendix to the Ripon Society's Petition for a Writ of Certiorari, herein cited as *App.* ——.

Each Republican convention adopts the formula for apportioning delegates to the next convention, and control over future apportionment thus rests solely with the membership of the body whose representative legitimacy is under attack. In 1976, 50 percent of the delegates will come from states that have only 45.9 percent of the Electoral College vote and 38.9 percent of the population, and which cast just 38.6 percent of the Republican presidential vote in 1972. The eight most populous states, on the other hand, will be alloted only 39.1 percent of the delegates to the 1976 Convention, despite the fact that these states have 42.4 percent of the Electoral College vote and 48.7 percent of the population, and cast 48.6 percent of the 1972 Republican presidential vote. (See Exhibits E and F, *App. 187 and 189.*)

Republicans from the larger states (those most disadvantaged by the present victory bonus), led by delegates

from New York, Pennsylvania, Ohio, Michigan, New Jersey, and Massachusetts, attempted to win approval for a nondiscriminatory apportionment formula at the 1972 Convention in Miami Beach. This effort was defeated 434 to 910, however, due in large measure to the opposition of a coalition of small-state delegates from the South and West, who voted nearly unanimously to preserve their favored position.

The underrepresentation of large state Republicans has an effect upon GOP conventions beyond the mere fact of smaller delegations from California, New York, Pennsylvania, Texas, Illinois, Ohio, Michigan, and New Jersey. These populous states are the center of most of the nation's industrial and commercial activities, the focus of urbanization and growth, and the home of the preponderance of blacks, ethnic Americans, and religious minorities. (See the Court of Appeals division opinion, *App. 157.*) Contrary to (a) the principles of fair representation, (b) concern for the GOP's narrowing base of popular support, and (c) the dictates of Rule 32 of the Republican Party's National Rules, which insists on "positive action to achieve the broadest possible participation by everyone in party affairs," successive conventions dominated by small-state, southern and western regional factions have consistently acted to exclude Republicans from the larger states and other areas of the country from meaningful participation in this critical phase of the process by which we elect our Presidents.

The Irrationality of the Present Allocation Plan

The *en banc* majority devoted considerable attention to "justifications of the challenged formula" in an attempt to discover a rational basis for the victory bonus system adopted by the 1972 Convention. *App. 102-105.* This attempt was unsuccessful. As Chief Judge Bazelon remarked: "The justifications, if they may be so named,

the court offers in support of the malapportionment of the Republican convention are the sort easily made and quickly forgotten." *App. 155*, Bazelon, C.J., *dissenting; citing* the division's *slip op.* at pp. 30-37.

The Court of Appeals majority below acknowledges that the victory bonus system "could stand some improvement, of course." It nevertheless defends the present allocation plan on the ground that it is not unreasonable (1) that party politics should be oriented toward keeping in the Republican camp those states which have previously voted for GOP presidential nominees, and (2) that the victory bonus may provide these "Republican" states with a reward and an incentive for the good work of their respective state party organizations. *App. 103.* Experience in the realities of national politics reveals that neither of these rationales (nor any of the others advanced by the Republican National Committee and evidently discarded by the *en banc* majority) is sustainable.

The assertion that a "state which has gone Republican in the past may do so again," ignores the fact that it just as likely may not. *App. 103.* Of the 26 states carried by the Republican nominee in 1960, only one was carried in 1964. Of the six states in which the GOP candidate won a majority in 1964, only two voted Republican in 1968. Of the 44 states that were not carried by the GOP nominee in 1964, only 14 were not carried in 1968. Of the states which carried for the Republican nominee in 1968, all did so again in 1972, but so did all but one of the 18 states where the same Republican candidate lost in 1968. The import of these political facts is clear. Any victory bonus that is based upon success only in the single, immediately preceding presidential election and fails to take into account the margin of victory or defeat in that election, will have little value in predicting future party success. *See*, "Developments in the Law-Elections," 88 *Harv. L. Rev.* 1111, 1200 (1975).

As for the Court of Appeals' second rationale, that the present victory bonus may offer an incentive to state parties to strengthen their organizations and improve their performance, this explanation is highly speculative and in our experience simply has no basis in fact. To begin with, the bonus system is at best superfluous. A strong party organization and a winning presidential candidate will tend to produce party victories throughout the ticket. It is thus difficult to believe that state and local organizations will refrain from attempting to maximize party strength merely because they will not be entitled to an award of extra votes at the National Convention to be held four years later. What is more, allocating the votes according to past presidential pluralities may result in bonuses to states that already have healthy party organizations, while withholding bonuses from those states which did not carry for the GOP nominee in the preceding election but could produce victories in the future by recruiting only a few additional adherents. *See*, "Developments in the Law-Elections," 88 *Harv. L. Rev.* 1111, 1199 (1975).

The victory bonus system as it is now embodied in Rule 30 serves no rational purpose that we have been able to discern. Certainly, the apologies offered by the Court of Appeals majority and the Republican National Committee are inadequate to justify the gross deviation from the one person-one vote and modified proportionality standards that under the Constitution must govern every stage of the presidential election process.

The Need for a Definitive Judicial Ruling

The constitutional guidelines within which a victory bonus system may be framed, and the subject of delegate apportionment generally, have been heatedly debated at recent Republican conventions. Yet throughout these debates neither the supporters nor the opponents of the

various allocation plans have been able with any confidence to appraise the legality of the competing alternatives. And the unsteady course of the present litigation during the past five years has done little to clarify the judicial standards applicable to this phase of electoral democracy. The order of Mr. Justice Rehnquist one week before the 1972 Convention stayed the District Court's order enjoining the use of a uniform victory bonus. This stay, followed by the Ripon Society victories in the District Court in January 1974 and in the Court of Appeals in March 1975, and the rehearing *en banc* ending in reversal of the District Court decision, has left conscientious party officials—not to mention the law—in a state of confusion.[2] The matters in controversy here are not only capable of repetition (as that term is used in the mootness cases), but absent a decision from this Court are almost certain to be relitigated in anticipation of the 1980 Convention. It is therefore plainly in the interests of all parties concerned that the Supreme Court act now to review conclusively these important issues of public policy.

For more than 40 years the Republican Party's delegate apportionment formula has included a victory bonus system designed with little regard to constitutional values. Unless an opinion is rendered by this Court, this pattern will be repeated in 1976. The delegates from those small-state, regional factions that (because of the inequities of the present formula) will undoubtedly enjoy majority control of the 1976 Convention can be expected to adopt a similarly objectionable plan for 1980—i.e., a plan that in addition to returning them or their successors to the next convention will further hinder Republican efforts to appeal to a broad national constituency.

[2] This is particularly true because of the *en banc* Court's unwillingness to resolve the threshold issues of state action and justiciability, which places in question but does not decide whether further recourse to the judiciary on these matters will even be permitted. *See* the concurring opinions of Judges Tamm and Wilkey, and the dissenting opinion of Senior Judge Danaher, *App. 109*, *127*, and *159*, respectively.

In any event, delegate apportionment is sure to be a major issue at the 1976 Convention, and without a definitive resolution of the constitutional questions raised in this litigation, the delegates and the Republican voters who elected them will be denied an opportunity to develop an apportionment formula for 1980 that is demonstrably consonant with a final adjudication by this Court.

CONCLUSION

As the Court has recognized, the conventions of the two major political parties serve the "pervasive national interest in the selection of candidates for national office." *Cousins* v. *Wigoda*, 419 U.S. 477, 490 (1975). And the paramount necessity for fair and effective performance of the tasks of these conventions is underscored by Mr. Justice Pitney's reminder that:

> "[T]he likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry* v. *United States*, 256 U.S. 232, 286 (1921) (Pitney, J., dissenting).

The major political parties and their national conventions are an integral part of the electoral process. To deprive certain Republican voters of the full representation at these important gatherings to which they are constitutionally entitled is thus to impair significantly their exercise of the franchise. Such a result is condoned and given new life by the opinion of the *en banc* Court of Appeals majority. But the Appellate Court's untenable ruling cannot be allowed to stand as the final judicial word on this subject. The Supreme Court should instead

grant the petition of the Ripon Society for a writ of *certiorari* so that this matter may receive from the highest tribunal the thorough constitutional analysis it properly deserves.

Respectfully submitted,

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